No. _____

In The
Supreme Court of the United States

ALTAGRACIA SANCHEZ, DALE SORCHER,
AND JILL HOMAN,

Petitioners,

v.

OFFICE OF THE STATE SUPERINTENDENT OF
EDUCATION AND DISTRICT OF COLUMBIA,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

RENÉE D. FLAHERTY
Counsel of Record
ROBERT J. MCNAMARA
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
rflaherty@ij.org
rmcnamara@ij.org

Counsel for Petitioners

QUESTIONS PRESENTED

A District of Columbia administrative agency promulgated regulations requiring day-care providers to obtain a college degree (on top of existing, extensive training requirements) to care for children ages zero to three. The agency imposed these regulations with no guidance from the legislature and no mechanism in place for review by a court.

1. Does the Due Process Clause require complete and total judicial deference to these regulations?

2. Does the nondelegation doctrine impose any limits on delegating to administrative agencies the power to enact such regulations?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Altagracia Sanchez, Dale Sorcher, and Jill Homan were the plaintiffs in the D.C. District Court and the appellants in the D.C. Circuit. Respondents Office of the State Superintendent of Education and the District of Columbia were the defendants in the D.C. District Court and the appellees in the D.C. Circuit.

STATEMENT OF RELATED CASES

Sanchez et al. v. *Office of the State Superintendent of Educ. et al.* (D.C. Cir.), No. 21-7014 (judgment entered August 12, 2022)

Sanchez et al. v. *Office of the State Superintendent of Educ. et al.* (D.D.C.), No. 1:18-CV-00975 (judgment entered January 13, 2021)

Sanchez et al. v. *Office of the State Superintendent of Educ. et al.* (D.C. Cir.), No. 19-7072 (judgment entered May 29, 2020)

Sanchez et al. v. *Office of the State Superintendent of Educ. et al.* (D.D.C.), No. 1:18-CV-00975 (judgment entered July 8, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 45 F.4th 388. The district court's opinion, App. 27a, is reported at 513 F. Supp. 3d 101.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2022. On September 20, 2022, Chief Justice Roberts extended the time to file a petition for a writ of certiorari through December 12, 2022. This petition is timely filed on December 12, 2022. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person shall * * * be deprived of life, liberty, or property, without due process of law."

The text of the District of Columbia's Child Development Facilities Regulation Act of 1998 (D.C. Code §§ 7-2031 *et seq.*) is reproduced at App. 54a.

The text of the District of Columbia's regulations governing the licensing of child development

facilities (D.C. Mun. Regs. tit. 5-A1) is reproduced at App. 77a.

STATEMENT

Altagracia Sanchez runs a day care in her home in the District of Columbia.[1] Like many other day-care providers in the District, Sanchez immigrated to the United States to pursue her dreams. She opened her day care in 2006 and supports her family with the income she earns. For ten years, Sanchez cared for dozens of infants and toddlers lovingly and competently. She scrupulously complied with the District's extensive training, continuing education, staffing, and facilities requirements. She took pride in her business because children are her passion. Families trusted her; her day care flourished.

But in 2016, the District told Sanchez that wasn't enough. Respondent Office of the State Superintendent of Education (OSSE), the administrative agency charged by the District with regulating day cares, issued a rulemaking requiring most of the city's day-care providers to obtain college degrees on top of existing annual training and professional development requirements.[2] This case is about whether courts must blindly defer to regulations that strip

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[1] The panel below dismissed this case under Federal Rule of Civil Procedure 12(b)(6). App. 2a–3a. This statement draws from the allegations of the complaint, which must be "accepted as true." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

[2] Notice of Final Rulemaking, 63 D.C. Reg. 14640–14813 (Dec. 2, 2016). OSSE's rulemaking repealed the District's existing day-care regulations and created new regulations under D.C. Mun. Regs. tit. 5-A1 (Child Development Facilities: Licensing). App. 77a.

Sanchez of her right to earn a living caring for children without providing any public benefit at all. It is also about whether OSSE, an administrative agency, should have the authority to strip Sanchez of her rights with no guidance from the legislature and no mechanism in place for review by a court.

When OSSE promulgated the college requirement in 2016, the agency's sole statutory directive was to "promulgate all rules necessary" to establish "[m]inimum standards of operation of a child development facility concerning staff qualification, requirements and training[.]" App. 61a.[3] Nothing instructed OSSE on what to prioritize. And the agency cared little about what day-care providers like Sanchez thought of the college requirement, refusing to translate the rulemaking into the languages spoken by the District's diverse workforce when a request to do so was made.[4] OSSE knew it would never be held accountable anyway, since rulemakings are not "contested cases" subject to judicial review under the District's Administrative Procedure Act.[5] No entity other than OSSE (that is, no legislature or court) had any

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[3] The rulemaking's stated purpose was to comply with a federal law appropriating funds to the states for child-care programs. 63 D.C. Reg. 14640 (Dec. 2, 2016) (citing Child Care and Development Block Grant Act of 2014, 42 U.S.C. 9858 *et seq.*). The law expressly did not call for increased credentials for day-care providers. See 42 U.S.C. 9858c(c)(2)(G)(iv) ("The Secretary [of Health and Human Services] shall not require an individual or entity that provides child care services for which assistance is provided * * * to acquire a credential to provide such services.").

[4] See 63 D.C. Reg. 14643–14644 (Dec. 2, 2016) ("District agencies, including OSSE, are not legally required to provide the requested translations of the proposed rulemaking.").

[5] D.C. Code § 2-510.

authority to review the rulemaking. The agency's word was final and its discretion unbounded.

Unsurprisingly, the result was that OSSE's new regulations were completely divorced from the harsh realities of day care in the District of Columbia. The District is the most expensive place to obtain child care in the country. The city's universal pre-kindergarten program means that day cares serve only infants and toddlers ages zero to three. Younger children are more expensive to care for than older children, and the District's onerous rents and zoning requirements impose even more expenses and obstacles. As a result, day cares operate on razor-thin margins. The average day-care provider in the District earns about as much as a fast-food cook.

The high costs of care are passed along to parents, who must also deal with a shortage of care. Parents join waitlists as soon they become pregnant and hope to receive a spot for which they will pay over $2,000 per month—more than the average cost of tuition at a local community college. Although the college requirement has not yet gone into effect,[6] many day cares in the District already refuse to hire workers without a degree. The result has been rising prices that many families cannot pay.

The District's new regulations require in-home providers who care for more than seven children (like

[6] Two months after Sanchez filed this lawsuit, OSSE issued another rulemaking extending the deadline for compliance for in-home providers like Sanchez from December 2019 to December 2023. Notice of Final Rulemaking, 65 D.C. Reg. 7032–7037 (June 29, 2018).

Sanchez) to obtain an associate's degree with a major in an early-childhood field by 2023.[7] App. 290a. This piece of paper is unlikely to make Sanchez (or anyone else) a better caregiver. College programs in early-childhood education vary widely in what they teach. Most of the required classes have nothing to do with caring for children. Just ask anyone currently attending Trinity University, which requires classes on "comparative religions" and "science of the environment," among other inapposite classes, to graduate with an early-childhood degree. "Early childhood education" is not a uniform degree program, and so requiring a degree in "early childhood education" does not guarantee that an individual will have followed any particular curriculum, learned any specific skill, or studied any specific topic for any certain number of hours. So long as their diploma has the label "early childhood" on it, OSSE doesn't care what day-care providers learn.

Sanchez values education. She has a law degree from her home country. She hasn't attended college in the United States, but there are many reasons for this. First, Sanchez already has a Child Development Associate credential, the private certificate that OSSE required to run an in-home day care before the 2016 regulations. A Child Development Associate credential is affordable, practical training for day-care providers. Crucially, it is possible to obtain the certificate in Spanish. Like many of the District's day-care providers, Sanchez speaks English well enough to run

[7] Teachers in day-care centers will be required to obtain an associate's degree with a major in an early-childhood field or at least 24 credit hours in an early-childhood field by 2023. App. 275a.

her business and get along well in her adopted country, but she cannot read or write English at a college level. No early-childhood programs in the District offer classes in Spanish. Even if it were possible for Sanchez to get a degree in English, like many other day-care providers, she cannot afford the time and money required to attend college.

OSSE's new rules have never been popular.[8] A few months after the first rulemaking, the District's City Council moved to exercise some control over OSSE by amending the District's Child Development Facilities Regulation Act of 1998[9] to require all of OSSE's future rulemakings to be subject to a 30-day period of review by the Council.[10] The Council also ordered OSSE to "conduct a study to assess the impact of [the college requirement] on staff members and the cost of child care in the District."[11] OSSE has not conducted the study.[12]

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[8] See Nicholas Clairmont, *D.C.'s Misguided Attempt to Regulate Daycare*, The Atlantic (July 11, 2017), https://www.theatlantic.com/business/archive/2017/07/dc-day-care-regulations-credentialism/532449/.

[9] D.C. Code §§ 7-2031 *et seq*. App. 54a.

[10] Child Development Facilities Regulation Act of 2017, D.C. Act 22-10 (codified at D.C. Code § 7-2036(a)(2)).

[11] Child Care Study Act of 2017, D.C. Law 22-11 (codified at D.C. Code § 7-2011.03).

[12] Sanchez's counsel has requested the study twice through the District's Freedom of Information Act, D.C. Code §§ 2-531 *et seq*., most recently in October 2022. OSSE responded to both requests with no responsive documents.

The Council's actions were too little, too late. Sanchez (along with hundreds of other day-care providers) faced a "quandary." *Sanchez* v. *OSSE*, 959 F.3d 1121, 1126 (D.C. Cir. 2020). Sanchez couldn't afford to shut down her day care to attend classes. She couldn't afford to pay tuition and didn't want to take out loans. She was stuck.

In 2018, Sanchez chose to fight back. Invoking 42 U.S.C. 1983, she sued OSSE and the District in the U.S. District Court for the District of Columbia along with another day-care provider and a parent. They claimed that the District's regulations violated their individual rights under the Fifth Amendment to the U.S. Constitution[13] and that OSSE's exercise of untrammeled discretion free from any legislative or judicial constraint constituted an unlawful delegation of legislative authority.

In 2019, the district court dismissed Sanchez's claims on threshold justiciability grounds.[14] The court

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[13] Petitioners brought two claims under the Fifth Amendment: substantive due process and equal protection. App. 7a. The Due Process Clause of the Fifth Amendment also guarantees equal protection. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

[14] *Sanchez* v. *OSSE*, No. 1:18-CV-00975, 2019 WL 2931285, at *6 (D.D.C. July 8, 2019). Two months after Sanchez filed this lawsuit, OSSE issued another rulemaking, which made Sanchez and a limited group of other in-home providers eligible to obtain temporary, renewable waivers from the college requirement. Notice of Final Rulemaking, 65 D.C. Reg. 7032–7037 (June 29, 2018). Sanchez received a waiver in April 2019, renewed the waiver in 2022, and must reapply to renew the waiver again every three years.

of appeals reversed.[15] Sanchez returned to the district court, which dismissed the case under Federal Rule of Civil Procedure 12(b)(6). App. 27a.

A panel of the D.C. Circuit affirmed. App. 3a. The panel concluded that OSSE's regulations "implicate no fundamental rights," and so rational-basis review applied. App. 8a. Purporting to be "sensitive to the burdens that OSSE's regulations impose on day-care workers," App. 15a, the panel nonetheless declared that OSSE can subject Sanchez to any hardships it wishes.

The panel acknowledged that day-care providers must take "[a] variety of courses outside the early-childhood major, from math and English to art and history," but reasoned that those courses "could be beneficial to someone tasked with the educational development of toddlers—as any adult who has been flummoxed by a two-year-old repeatedly asking 'why' can attest." App. 13a. If OSSE can force Sanchez to take college classes in anything a two-year-old might ask about before taking care of toddlers for a living, then OSSE can do just about anything.

OSSE can force Sanchez to take "fencing or Shakespeare" because toddlers might be curious about both. App. 12a. Any "idiosyncratic course requirement[]" is just fine, no matter if it does nothing to make Sanchez a better caregiver. App. 12a–13a. OSSE was under no obligation whatsoever to ground

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[15] *Sanchez* v. *OSSE*, 959 F.3d 1121, 1126 (D.C. Cir. 2020). The court of appeals held that OSSE's "discretionary, time-limited and revocable waiver" did not render Sanchez's claims moot or unripe. *Id.* at 1125–1126.

its rulemaking in reality because "[u]nder rational-basis review, the policy choices of the political branches are 'not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" App. 14a (quoting *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

The panel valued Sanchez's right to care for children so little that it did not apply the ordinary pleading standard to her claims. The panel held that "[a] plaintiff bringing a constitutional challenge to a regulation on rationality grounds * * * faces the unenviable task of refuting every conceivable basis which might support it." App. 10a (cleaned up). Sanchez managed to do just that, but the panel did not "accept [Sanchez's] factual allegations as true and draw all reasonable inferences in [her] favor." Contra App. 9a. Despite Sanchez's allegations that "taking expensive college classes would serve no purpose," App. 6a, the panel held that "OSSE could reasonably conclude that the coursework required to earn an associate's degree in early-childhood education would be, generally speaking, relevant to the work of childcare providers." App. 12a–13a. Despite Sanchez's allegations that "the college requirements do absolutely *nothing* to further any legitimate government interest," App. 8a (cleaned up), the panel held that "OSSE * * * could have rationally concluded that requiring childcare workers to complete a predominantly relevant course of study will improve the quality of care young children receive." App. 13a.

The panel held Sanchez to an impossible standard: "A plaintiff bringing a constitutional challenge to

a regulation on rationality grounds * * * faces the unenviable task of refuting every conceivable basis which might support it." App. 10a. By dismissing her claims at the outset, the panel deprived Sanchez of the opportunity to build a record to refute OSSE's justifications for the college requirement: "A conceivably rational justification for the college requirements is readily apparent, and, in this context, that is all due process requires." App. 15a.

The panel also held that the limitless power to strip Sanchez of her right to care for children can be wielded by OSSE with impunity. The panel dismissed Sanchez's nondelegation claim, holding that "[u]nder the current standard, the Facilities Act sets forth an intelligible principle to guide OSSE's regulation of daycares." App. 21a–23a. It did not identify a principle in the statutory text, but instead found that the principle was implied—and, even then, the most the Court could say was that OSSE should impose requirements "relate[d] to the care, supervision, and guidance of children." *Ibid.* But even that vague statement was plenty: After all, the panel argued, "the United States Code contains many comparable delegations," citing to statutes that authorize federal authorities to set minimum standards for occupations like airport security personnel or physician assistants providing services paid for by federal dollars. App. 23a–24a. Seeing no apparent difference between allowing an agency to set standards for jobs like those and allowing an agency to decree that a longtime private entrepreneur like Sanchez was no longer good enough to be allowed to run her business, the panel affirmed. *Ibid.* Judge Randolph concurred with the panel's decision but noted that this Court's

"nondelegation jurisprudence appears to be in a state of flux." App. 26a.

This petition followed.

REASONS FOR GRANTING THE PETITION

This case asks whether judges must blindly defer to administrative regulations that require a college degree to care for two-year-olds. Day-care providers have a constitutional right to engage in their occupation, but there is confusion over which rights deserve more than complete and total deference from the courts, and about whether the nondelegation doctrine places any limits on an administrative agency's ability to strip individuals of their deeply rooted rights. This case is a good vehicle to take a first step toward resolving these issues by deciding whether the right to engage in one of the oldest, most common occupations—caring for children—can be left to the whims of an administrative agency and dismissed with no judicial scrutiny whatsoever.

I. There Is Confusion Over Which Individual Rights Merit More Than Complete and Total Judicial Deference. Caring for Children Is One of Them.

The ruling below held that Sanchez's right to earn a living caring for children can be taken away for any reason—or for none. This cannot be. *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), reaffirms that courts must protect deeply rooted individual rights. If the Court intends to protect rights that are "essential to our Nation's 'scheme of ordered liberty,'" *id.* at 2246, then the lower courts

must know which rights are so essential. Only this Court can determine whether the right to engage in a common occupation—in this case, one of the oldest and most common occupations, caring for children—deserves any judicial scrutiny at all.

A. The ruling below held that Sanchez's right to earn a living caring for children can be taken away for any reason—or for none.

The panel's decision, although unpopular,[16] is unsurprising. The right to engage in a common occupation often receives little to no protection under modern doctrine despite its deep roots in American history and tradition.

The panel held that the District's regulations "implicate no fundamental rights," App. 8a, and that meant that Sanchez's claims never stood a chance. Since *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938), rights seen as non-fundamental, including the right to engage in a common occupation, have been consistently reviewed under the rational-basis test. The panel below applied the weakest, most deferential version of that test to hold that the college requirement "must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis'" for it. App. 9a (quoting *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993))

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[16] See Editorial, *The High Price of Great Books Day Care*, Wall St. J. (Aug. 22, 2022), www.wsj.com/articles/the-high-price-of-great-books-daycare-federal-court-sri-srinivasan-ilumi-sanchez-washington-d-c-11660770791.

According to the panel, if a two-year-old can dream it up, OSSE can require a day-care provider to study it for two years. Or even ten years. See Oral Argument (8:15), *Sanchez* v. *OSSE*, 45 F.4th 388 (D.C. Cir. 2022) (Judge Katsas: "Suppose you required that these folks have a Ph.D.?" A: "* * * I think for the Ph.D. hypothetical, that would be constitutional as a straightforward application of the standard.").[17] And if day-care providers need a degree, then why not parents? OSSE is not "pressing" that theory (for now). *Id.* at 7:19 (Judge Katsas: "Under that theory, nobody should be a parent unless they have a college degree, right?" A: "That's not the theory we're pressing here, Your Honor, because we're not saying that these requirements are necessary. And necessity isn't the test for rational basis.").

For anyone who has ever met a two-year-old, it is not "reasonably conceivable" to believe that a college degree would help one answer her questions. But under the panel's wildly permissive version of the rational-basis test,[18] the only limit to a regulator's power is her imagination. And like toddlers, regulators love to use their imaginations. The Department of Justice, for instance, has gone as far as arguing that Congress could rationally justify a law because

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[17] Available at https://tinyurl.com/yc52byw5.

[18] This Court sometimes (but not often) applies meaningful review to rational-basis claims. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 Ind. L. Rev. 357, 416–417 (1999). See also *St. Joseph Abbey* v. *Castille*, 712 F.3d 215 (5th Cir. 2013) (striking down Louisiana regulation preventing monks who were not licensed funeral directors from selling caskets based on record evidence that doing so did not protect the public).

"space aliens are visiting this planet in invisible and undetectable craft."[19] Judges have active imaginations as well. In *Meadows* v. *Odom*, a district court upheld Louisiana's licensing law for florists because of "a flower that has some type of infection, like, dirt that remained on it when it's inserted into something they're going to handle." 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated as moot*, 198 Fed. Appx. 348 (5th Cir. 2006). The Tenth Circuit held that it was rational to require *online* casket sellers to embalm 25 corpses for practice. *Powers* v. *Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004).

OSSE did not invoke aliens to justify the college requirement, but it may as well have. Sanchez alleged in her complaint that the college requirement does absolutely *nothing* to further any legitimate government interest. App. 8a. She alleged that she *cannot* go to college. App. 6a. But no burden was too high; no demand was too unreasonable. The panel's supine legal standard was decisive.

OSSE's counsel was forthcoming at argument: The college requirement isn't "necessary." Oral Argument at 7:19 (OSSE's counsel: "We're not saying that these requirements are necessary. And necessity isn't the test for rational basis."). But the panel below still "cup[ped] [its] hands over [its] eyes and then imagine[d] if there could be anything right with" the District's day-care regulations. *Arceneaux* v. *Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J.,

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[19] Oral Argument 34:37–35:27, *Alaska Cent. Express Inc.* v. *United States*, 145 Fed. Appx. 211 (9th Cir. 2005), https://cdn.ca9.uscourts.gov/datastore/media/2005/07/13/03-35902.mp3.

concurring). Sanchez's right to earn a living caring for children is far too important to be subject to rational-basis review.

B. *Dobbs* v. *Jackson Women's Health Organization* reaffirms that courts must protect deeply rooted individual rights, and few rights are more deeply rooted than the right to earn a living caring for children.

Many prominent judges, justices, and scholars have criticized the rational-basis test, but only this Court can rescue a right from the rubbish heap. The right to earn a living caring for children is a good place to start. People have been caring for each other's children since the dawn of time. Indeed, one cannot imagine a free, orderly society without people you can pay to watch your kids.

This Court recently reaffirmed that rights "that are not mentioned in the Constitution" "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[20] *Dobbs*, 142 S. Ct. at 2242 (quoting *Washington* v.

[20] This Court has identified the right to marry, *Loving* v. *Virginia*, 388 U.S. 1 (1967); to have children, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to marital privacy, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin* v. *California*, 342 U.S. 165 (1952); to refuse unwanted lifesaving medical treatment, *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); and to make decisions concerning the care, custody, and control of one's children, *Troxel* v. *Granville*, 530 U.S. 57 (2000); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Glucksberg, 521 U.S. 702, 721 (1997)). In determining whether a right is "deeply rooted" and "essential to our Nation's scheme of ordered liberty," the Court has "engaged in a careful analysis of the history of the right at issue." *Id.* at 2246 (internal quotation marks omitted). A careful historical analysis shows that the right to engage in a common occupation is one of the most "deeply rooted" rights of them all. See Pet. for Writ of Certiorari, *Tiwari* v. *Friedlander*, No. 22-42 (U.S. July 12, 2022), cert. denied 2022 WL 17085182 (Nov. 21, 2022).

From English common law to the founding of this country, the right to earn a living has been considered fundamental. See, *e.g.*, Timothy Sandefur, *The Right To Earn A Living*, 6 Chap. L. Rev. 207, 209–217 (2003) (citing cases from the 14th century onward); 1 William Blackstone, *Commentaries* *427 ("At common law, every man might use what trade he pleased."); John Locke, *Two Treatises of Government* 15 (Edes & Gill 1773) (1690) ("The *labour* of his body, and the *work* of his hands, * * * are properly his."); Va. Decl. of Rights § 1 (1776) (George Mason) ("[A]ll men * * * have certain inherent rights * * * namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."); Letter from Madison to Jefferson (Oct. 17, 1788) (expressing that monopolies were "justly classed among the greatest nuisances in Government"); First Inaugural Address of Thomas Jefferson (1801) (describing good government as "leav[ing individuals] to regulate their own pursuits of industry and improvement" and "not tak[ing] from the mouth of labor the bread it has earned").

In light of this history, Judge Sutton of the Sixth Circuit has called for this Court to reconsider the right to engage in a common occupation:

> many thoughtful commentators, scholars, and judges have shown that the current deferential approach to economic regulations may amount to an overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights. * * * And is there something to Justice Frankfurter's criticism of the dichotomy between economic rights and liberty rights, a dichotomy first identified in *Carolene Products*? * * * But any such recalibration of the rational-basis test and any effort to create consistency across individual rights is for the U.S. Supreme Court, not our court, to make.

Tiwari v. *Friedlander*, 26 F.4th 355, 368–369 (6th Cir. 2022) (citations omitted). Likewise, Judge Ho of the Fifth Circuit observed:

> The Supreme Court has recognized a number of fundamental rights that do not appear in the text of the Constitution. But the right to earn a living is not one of them—despite its deep roots in our Nation's history and tradition. * * * Cases like this nevertheless raise the question: If we're going to recognize various unenumerated rights as fundamental, why not the right to earn a

> living? * * * But that is for the Supreme Court to determine.

Golden Glow Tanning Salon, Inc. v. *City of Columbus*, 52 F.4th 974, 981, 984 (5th Cir. 2022) (Ho, J., concurring).

Judge Ho and Judge Sutton are correct. Only *this Court* can determine whether the right to engage in a common occupation is deeply rooted in our Nation's history and tradition. Caring for children is one of the oldest occupations.[21] And this Court has already held in cases like *Troxel*, *Pierce*, and *Meyer* that

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[21] Caring for children is not new, but government licensing of day cares is "a relatively recent development." Erica B. Grubb, *Day-Care Regulation: Legal and Policy Issues*, 25 Santa Clara L. Rev. 303, 305 (1985); see also Emily D. Cahan, *Past Caring: A History of U.S. Preschool Care and Education for the Poor, 1820-1965*, 25 (1989) (noting that a "campaign to raise day nursery standards by means of state regulation" via mandatory licensure did not arise until the mid-1920s—a century after the basic framework of modern day care developed—and was "only partially successful" because, even where day nurseries were subject to some form of regulation, these licensure requirements "were not strictly enforced"). Indeed, by the end of World War II, following the massive expansion of day-care operation in the United States driven by the need to employ women in war industries, less than 25% of states had any licensing laws specifically directed at day care. Grubb, *supra*, at 313 (noting that, by 1944, only nine states had "specific day-care licensing laws rather than general laws regulating foster care"). Yet this lack of regulation persisted although the system of day care as it existed in World War II—and how it largely still remains—had been established well before the Civil War. See Geraldine Youcha, *Minding the Children: Child Care in America from Colonial Times to the Present* (2005) (discussing the history of child care in the United States, from its origins in the infant school movement in the 1820s).

raising and caring for children is one of the deeply rooted areas where government power may not tread unimpeded. Do those rights change simply because someone like Sanchez also earns money as she cares for the children entrusted to her care? The panel below clearly thought so—even though, as Judge Ho rightly observed, there is no historical basis for that belief. If there exists any protectable right to earn a living in the Constitution, surely the right to earn a living by caring for children falls within it. The Court should grant certiorari and say so.

II. This Case Allows the Court to Address Whether the Legislature May Give Administrative Agencies Unfettered Discretion to Decide Who May Work in Private Employment.

The panel opinion below made short work of the nondelegation claim here. And understandably so: "[S]ince 1935, [this] Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Gundy* v. *United States*, 139 S. Ct. 2116, 2130–2131 (2019) (Alito, J., concurring). If that is the standard, then this regulation—undeniably an important rule adopted pursuant to an extraordinarily capacious standard—falls comfortably within it.

The problem is that it is not at all clear this should be the standard. At least four Members of this Court have suggested it should not. See *Ibid.* (Alito, J., concurring); accord *id.* at 2138–2140 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (explaining that the modern practice of upholding any

delegation so long as it is cabined by an "intelligible principle," however vague, "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked"). It is no wonder, then, that lower courts, as Judge Randolph did below, have noticed this "state of flux" in the Court's nondelegation jurisprudence. App. 26a.

But there is no reason for this state of flux to continue. If any "intelligible principle," however broad, will be enough to uphold a delegation, the Court should say so. Alternatively, if the Court intends to return to a more historically grounded understanding of the separation of powers, lower courts should know that as well.

And this case represents a perfect opportunity to resolve the confusion in the Court's modern nondelegation doctrine.[22] The "intelligible principle" supporting the college requirement is as vague as they come: The agency is told only to set "minimum qualifications [for day-care workers that] relate to the care,

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[22] This Court has never determined whether the non-delegation doctrine applies with equal force to the legislative power of the District of Columbia, and it need not do so here. Instead (following both the district and appellate courts) it can assume without deciding that the doctrine applies and answer the question that resolved the dispute between the parties below. Cf. *McDonough* v. *Smith*, 139 S. Ct. 2149, 2155 (2019) (assuming without deciding that the right at issue, stated as the "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer," arises under the Due Process Clause (cleaned up)); *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 161 (2016) (assuming without deciding that the plaintiff utility companies may seek declaratory relief under the Supremacy Clause).

supervision, and guidance of children" App. 62a. But that, at most, is a description of the *area* in which legislative power has been delegated. It says nothing about how that power should be exercised. It allows the agency (as it did for years) to decree that day-care providers must take certain specified training courses. It allows the agency to decide (as it suddenly did in 2016) that day-care providers need a college degree. Indeed, given the combination of the breadth of the delegation and the extraordinarily deferential version of the rational-basis test applied below, it is difficult to imagine a regulation that would be *impermissible*. Can day-care providers be required to hold a master's degree? Bench-press 150 pounds? Speak English—or Spanish or Finnish—with the fluency of a native? There is no obvious reason why not. To the extent there is an "intelligible principle" animating the delegation of legislative authority, it is simply that the agency should regulate day-care providers—by its own lights, in its own discretion.

That is a delegation of legislative power. And it is a delegation that fits into none of the historically-grounded, permissible delegations enumerated in Justice Gorsuch's *Gundy* dissent. It does not, for example, set a general policy but allow the agency to fill in less-important details. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). It does not call upon the executive to make determinations that hinge on extensive fact-finding. *Ibid.* It does not delegate powers, like those over foreign affairs, that already reside in part within the executive. *Ibid.* Instead, it takes a quintessential question of "private conduct"—who is permitted to watch other people's children in their

own home—and relegates it to the sole discretion of an administrative agency. *Ibid.*

Perhaps, as the lower court held, that is a legislative question that can be confided to the sole discretion of unelected bureaucrats. But perhaps regulations of private conduct—particularly private conduct that has been widespread since long before the Constitution itself—should originate in the legislature rather than the executive. This Court's cases are ambivalent about which of these is true, and certiorari should be granted to resolve that important, fundamental question of constitutional law.

III. This Case Is a Good Vehicle.

This case presents a good vehicle to resolve the questions presented. The court of appeals dismissed Sanchez's claims under Rule 12(b)(6). Additionally, the court of appeals already found that Sanchez's claims are justiciable. These circumstances make the Court's job simple: determine the applicable legal standards and remand to the district court to decide whether Sanchez has stated claims.

First, the court of appeals dismissed this case under Rule 12(b)(6). App. 3a. At this early stage, all factual allegations must be "accepted as true," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009), and the Court need not sort through a complicated record or weigh the merits of Sanchez's claims. The Court need only determine whether Sanchez's right to earn a living caring for children deserves any protection at all, and whether the nondelegation doctrine places any restraint on administrative agencies at all. The district court can follow the Court's instructions on remand.

Second, the court of appeals already found that Sanchez's claims are ripe and were not mooted by OSSE's changes to the regulations. *Sanchez*, 959 F.3d at 1126. Sanchez's claims for nominal damages also insure against mootness. See *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 802 (2021). Resolution of these threshold issues further simplifies the Court's task.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

RENÉE D. FLAHERTY
Counsel of Record
ROBERT J. MCNAMARA
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
rflaherty@ij.org
rmcnamara@ij.org

Counsel for Petitioners

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